

Council on Postsecondary Education
Committee on Equal Opportunities
January 24, 2011

**2011-15 Kentucky Public Postsecondary Education Diversity
Policy and Framework for Institution Diversity Plan Development**
Kentucky Administrative Regulation 13 KAR 2:060

ACTION: The staff recommends that the revised Kentucky Administrative Regulation 13 KAR 2:060 implementing the 2011-15 Kentucky Public Postsecondary Education Diversity Policy and Framework for Institution Diversity Plan Development be approved and forwarded to the Council on Postsecondary Education for review and action.

The 1992 Session of the General Assembly enacted KRS 164.020(19) which requires the Council on Postsecondary Education to postpone the approval of new academic programs for those institutions who fail to meet equal opportunity goals established by an institution and adopted by the Council. The 1997 Special Session of the General Assembly which reorganized postsecondary education left unchanged the authority of the Council related to implementation of new academic programs. The Kentucky Revised Statutes establish the Council's responsibility to approve the offering of new academic degree programs, KRS 164.020(15) and also limits an institution's eligibility for new academic degree programs, KRS 164.020(19) by the requirement that an institution meet its equal opportunity goals.

Adoption of the Kentucky Public Postsecondary Education Diversity Policy and Framework for Institution Diversity Plan Development by the Council, September 2010, requires revision of the Kentucky Administrative Regulation 13 KAR 2:060. (See Attachment 1A)

Legal Considerations

It is the opinion of outside legal counsel that the proposed administrative regulation and the policy adopted by reference are so narrowly tailored as to withstand constitutional scrutiny under existing laws.

Following adoption of the Kentucky Public Postsecondary Education Diversity Policy and Framework for Institution Diversity Plan Development by the Council, Council staff sought confirmation of the CPE position that the policy, KRS 164.020(19), and subsequent administrative regulation could pass constitutional scrutiny. CPE sought outside review of the policy and proposed administrative regulation. Also, included in the inquiry was whether a race conscious policy is necessary to allow an institution to garner a critical mass of diversity among the student body.

Findings of outside counsel:

- Will the proposed regulation pass constitutional scrutiny? Their answer, yes.
- The regulation proposed by the CPE is narrowly tailored to focus on numerous factors that should be considered by institutions in establishing goals to achieve diversity of the student body. The regulation does not authorize, and in fact rejects, any attempt to allow special consideration for race or ethnicity. It does recognize race as an existing factor, but treats it only as one factor that may be present. It recognizes that student body diversity is important to the student, the institution, the Commonwealth, and the area served by the institution.
- CPE has legal authority to establish equal opportunity educational goals for public postsecondary education in Kentucky. A diversity policy requiring measurable goals associated with institutional demographics and the institutional service area does not amount to the imposition of racial quota or racial balancing.
- The CPE's interest in student body diversity, embraced in the diversity policy and the proposed regulation, is a compelling one for Kentucky, capable of supporting narrowly-tailored means, i.e., diversity plans.
- Neither the diversity policy nor the proposed regulation contain any language where the CPE fixes, reserves, or guarantees a specified percentage of the student body for members of a select ethnic group.

Background

The Council's decision to advocate student body diversity at public postsecondary institutions in Kentucky is consistent with the practices and policies around the country. The authority of CPE to engage in diversity planning is also derived from KRS 164.003 which describes the legislative findings and goals for achievement by 2020, including a well educated and highly trained workforce and development of a society; KRS 164.0203(5) which grants CPE authority to develop and implement a strategic agenda (strategic implementation plan, benchmarks, and review goals and plan) in furtherance of the long-term goals established in KRS 164.003(2) (the CPE strategic agenda includes the statewide diversity policy); and KRS 164.095(3) which outlines the postsecondary education accountability process calling for an ongoing evaluation of quality and effectiveness in Kentucky postsecondary educational institutions and provides a method for evaluating each institution's progress toward meeting specific goals, principles, strategies, objectives, and benchmarks as set forth in the strategic agenda.

The statutory requirement imposed by KRS 164.020(19) is implemented by Kentucky Administrative Regulation 13 KAR 2:060 which establish criteria for determining an institution's compliance with equal opportunity goals and for the granting of a temporary waiver to a state-supported postsecondary education institution that has not met its equal opportunity goals. The statutory provision presupposes that equal opportunity goals exist and that there is a means to measure those goals.

The diversity policy and framework guide development of institution plans and the revision of the Kentucky Administrative Regulation that implements those plans. The KAR is revised to reflect the requirements for diversity planning, will be reviewed and acted on by CPE, will be subjected to a public hearing and public comment period, will provide information relative to the regulatory impact and the fiscal impact, will be reviewed by the Administrative Regulation

Review Subcommittee, and, finally, will be heard by the appropriate jurisdictional legislative subcommittee.

Revised Kentucky Administrative Regulation (KAR)

The Council's interest in student body and workforce diversity is compelling and capable of supporting narrowly-tailored means, i.e., institution diversity plans. To the extent possible, the revised KAR provides clear guidance for developing an institutional diversity plan, the accountability standards, metrics to determine progress, and requirements to obtain a waiver. The following changes are incorporated to implement the statewide diversity policy and framework:

- The KAR requires an institution to develop and maintain an institution diversity plan.
- The KAR sets out the process for goal setting, measurement of progress, and how to secure a temporary waiver.
- The KAR defines the diversity policy as the Kentucky Public Postsecondary Education Diversity Policy and Framework for Institution Diversity Plan Development.
- The KAR defines an institution diversity plan as a plan developed by an institution in conjunction with the CPE to achieve diversity in student enrollment and in the workforce and to eliminate gaps in retention and graduation rates.
- The KAR requires a postsecondary institution to set and attempt to meet their goals.
- The KAR provides five areas of goal development: student body diversity, student success, achievement gaps, workforce diversity, and campus climate.
- The KAR retains the metrics currently used to establish progress for each goal.
- The KAR retains the criteria for an institution (two-year or four-year) to achieve automatic eligibility for new academic programs.
- The KAR defines the period of waiver eligibility as one year.
- The KAR defines the time frame for a waiver as one year.

Process

The Legislative Research Commission established a model administrative regulation drafting and process requirements that must be adhered to when creating or revising an administrative regulation. After action by the CPE the KAR will be filed with the Legislative Research Commission. The process for KAR approval is approximately six months from beginning to conclusion.

Next Steps

Following action by the Committee on Equal Opportunities, staff will forward the recommendation to the Council on Postsecondary Education for review and action at its meeting February 3-4, 2011. Upon review and action by CPE the regulation will be filed with the Legislative Research Commission and appropriate hearings will be held as required by current procedures. Institution draft diversity plans are to be submitted to CPE staff for review March 15, 2011, and are projected to be acted on by the CPE at the September 2011 meeting.